No. 02-1810

JUL 16 2003

In The Supreme Court of the United States

E. JOSEPH FACE, JR., in his official capacity as Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission, and SUSAN E. HANCOCK, in her official capacity as Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission,

Petitioners,

v.

NATIONAL HOME EQUITY MORTGAGE ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals abuse its discretion by applying the law of the case doctrine in declining to revisit the merits of the case in an appeal from the award of fees after the case on the merits was concluded?

2. Should the Court overrule its decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *Missouri v. Jenkins*, 491 U.S. 274 (1989), and hold instead that when a plaintiff prevails in an action against state officials for injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, the doctrine of sovereign immunity bars an award of attorney's fees under 42 U.S.C. S 1988?

3. Should the Court overrule its decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (construing 42 U.S.C. § 1988 to authorize awards of reasonable attorney's fees as part of costs to prevailing plaintiffs, but requiring prevailing defendants to show that the suit was frivolous or brought in bad faith), and replace that rule with an "even-handed" approach to the award of fees, even though the legislative history clearly shows that Congress intended the construction adopted by the Court?

THE PARTIES

I. The National Home Equity Mortgage Association ("NHEMA") is a national trade association focusing primarily upon the home equity lending market. Members of this voluntary trade association include banks, mortgage lending corporations, secured equity lenders, law firms, title insurers, consulting firms, and appraisal services corporations. Its membership includes entities that are licensed by the Bureau of Financial Institutions, Virginia State Corporation Commission, to conduct business in the Commonwealth of Virginia, and that also qualify as housing creditors under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-3806 ("Parity Act").

E. Joseph Face, Jr. is the Commissioner of Financial Institutions, Bureau of Financial Institutions, Virginia State Corporation Commission. He is responsible for the division that administers state laws regulating financial services institutions licensed by the Bureau. He executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

Susan E. Hancock is the Deputy Commissioner, Consumer Finance, Bureau of Financial Institutions, Virginia State Corporation Commission. She is responsible for the administrative section that examines and supervises the operations of financial services institutions (except for state-chartered banks and credit unions) licensed by the Bureau. She executes and enforces state policy initiatives directly affecting NHEMA members licensed to conduct business in the Commonwealth of Virginia who also qualify as housing creditors under the Parity Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, respondent National Home Equity Mortgage Association hereby discloses that it is a national trade association as noted *supra*, that it has no parent corporation, and that there is no publicly held company that owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Respondent NHEMA departs from petitioners' Statement of the Case to the extent that they assert that NHEMA challenged the constitutionality of Va. Code §§ 6.1-330.83 and 6.1-330.85. Petition, at 4. Both statutes are constitutional exercises of the Commonwealth of Virginia's police power, when properly applied. NHEMA's suit sought, successfully, to restrain enforcement of these state statutes to invalidate home mortgage prepayment penalty provisions permitted under the federal Alternative Mortgage Transaction Parity Act, 12 U.S.C. §§ 3801-3806. The Parity Act permits lenders subject to its provisions to make, purchase, and enforce mortgages conforming to regulations issued under the Act according to the terms of the instruments. 12 U.S.C. § 3803(a)(3). The officials sued in this case in their official capacities had indicated their intention to enforce these state statutes against lenders despite the lenders' availing themselves of their federal right under preemptive effect of federal law. *See* Petition, at App. 34 – App. 36.

REASONS WHY THE WRIT SHOULD BE DENIED

Introduction and Summary of the Argument

This case comes before the Court on petition from the decision of the United States Court of Appeals for the Fourth Circuit affirming an award of attorney's fees under 42 U.S.C. § 1988. Petitioner's initial argument seeks further review of the merits in the guise of a challenge to NHEMA's prevailing party status under § 1988.

However, that argument is foreclosed because, inasmuch as petitioners failed to appeal the determination

that NHEMA had an individually enforceable right under § 1983 derived from the Parity Act, the Court of Appeals correctly applied the law of the case doctrine. The Court of Appeals also reached the correct result on the additional ground that the decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002), which addressed when a right of action may arise for an implied federal right, does not even apply to this case. Here, the federal right is explicitly granted. In fact, the creation of a federal right was the central purpose of the Parity Act. *Gonzaga Univ. v. Doe* did not change the law applicable to the merits of this case, and there is no reason to revisit the merits yet again.

Petitioners next repeat the arguments urged on the Court before, that the cases of *Hutto v. Finney*, 437 U.S. 678 (1978), and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), should be overruled. A correct reading of those cases and the Court's subsequent decisions refutes that contention. Unless the Court is prepared to overrule *Hutto* and *Hensley*, and the cases, myriad in number, that depend upon their reasoning, it should deny the writ in this case. Indeed, adoption of the rule argued for by petitioners would go beyond overruling *Hutto*. It would change the operation of The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("§ 1988"), fundamentally.

Petitioners claim that the Court's jurisprudence of attorney's fees under § 1988, at least as it applies to states or state officials, has been overruled by the Court's recent decisions involving the Eleventh Amendment. The petition in this case recycles several arguments that the Court has rejected over the years. Therefore, petitioners assert, a revised interpretation of § 1988 is required to avoid constitutional infirmity.

The crux of petitioners' argument is that the States' sovereign immunity protects them against an award of

attorney's fees. Petitioners claim that immunity can only be abrogated by Congress acting under its enforcement authority under § 5 of the Fourteenth Amendment, and then only for Fourteenth Amendment-based claims and only by a "clear statement" of such abrogation in the language of the statute itself.

Petitioners assert further that the States' immunity precludes Congress from treating the States less favorably than other litigants. Consequently, they assert, the rule in *Hensley v. Eckerhart*, which treats prevailing plaintiffs under § 1988 differently from prevailing defendants, cannot constitutionally be applied to States.

The petitioners' arguments do not undercut, either factually or legally, either basis of the Court's holding in *Hutto* - first, that Congress abrogated the States' Eleventh Amendment immunity in enacting § 1988, and second that States have been liable historically for awards of costs to prevailing opponents without regard to the Eleventh Amendment. *Hutto* rejected the arguments made here in 1978. *Missouri v. Jenkins* rejected the same arguments in 1989, when the petitioners there asserted that further development of the Court's Eleventh Amendment jurisprudence had changed the law. In *Missouri v. Jenkins*, 491 U.S. at 280, the Court held that the Eleventh Amendment simply did not apply to an award of attorney's fees ancillary to a grant of prospective relief.

Petitioners now ask the Court to decide that some important threshold has been passed that was not passed in 1978 or 1989. But the Court has consistently held that Congress intended to and did abrogate the States' Eleventh Amendment immunity against awards of attorney's fees under § 1988. Just as consistently, it has held that the States' historical liability for costs is an adequate basis by itself for fees to be awarded, apart from any considerations

of State immunity. After *Missouri v. Jenkins*, petitioners' arguments grounded in the Eleventh Amendment are completely misdirected.

Furthermore, because it is clear that the Eleventh Amendment has no application to the issues before the Court, petitioner's questions presented are reduced to matters of statutory construction, where considerations of stare decisis have the greatest force. The Court cannot reverse a body of law dating back to *Hutto* in 1978, and even further, without transgressing the important principles embodied in the doctrine of *stare decisis*.

The arguments that petitioners advance ought to fare no better on this occasion than when they were rejected by the Court in the past. It is beyond reasonable dispute that Congress has validly abrogated the States' immunity against awards of attorney's fees ancillary to prospective relief against state officials. It is also beyond reasonable dispute that Congress had sufficient authority to permit recovery of such fee awards as part of costs, apart from any considerations of State immunity.

Finally, petitioners' assertion that *Hensley* subjects States to a discriminatory rule is not well-taken. States are not discriminated against *qua* States because their employees acting in their official capacities are not the only state actors subject to § 1983. Many defendants subject to § 1983 and the other statutes triggering liability under § 1988 are not state officials at all, and the award of fees against them is not an award against the State. *See, e.g., Morse v. Republican Party*, 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355 (W.D. Va. 1997) (*mem.*).

ARGUMENT

1. Consideration Whether NHEMA Has a Federal Right Enforceable Under 42 U.S.C. § 1983 Is Foreclosed by the Law of the Case.

Petitioner seeks review of the issue whether NHEMA had a federal right enforceable under § 1983 in the first instance. The Fourth Circuit has held twice that petitioner waived that issue by failure to appeal from the district court's judgment on the merits. Petitioner now asserts that this Court rescued it from its default by remanding the case for reconsideration in light of *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). But nothing in the mandate prevented the Fourth Circuit from finding a procedural default.

The case of *Gonzaga Univ. v. Doe* dealt with the standards for determining whether there was a federal right enforceable by action under § 1983. In this case, NHEMA, which was the plaintiff below, filed a § 1983 action to enforce federal rights of its members under the Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. §§ 3801-06. In its decision on the merits, the district court found that there was a federal right enforceable under § 1983. *National Home Equity Mortgage Ass'n v. Face*, 64 F. Supp. 2d 584, 591 (E.D. Va. 1999), *aff'd*, 239 F.3d 633 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001). That ruling was not appealed. *See* Petition, App. 25. The district court was affirmed on appeal.

After denial of certiorari in this Court, the case was remanded to the district court for consideration of NHEMA's claim for attorney's fees under 42 U.S.C. § 1988. At this point, the petitioners challenged NHEMA's status as a prevailing party under 42

U.S.C. § 1983. *See* Petition, App. 24. The district court held that that point had been waived. Petition, App. 25. The district court said:

> However, in the present case, the Court did not hold that the Supremacy Clause created rights enforceable under section 1983. Instead, the Court applied the three-part test set forth in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990), and specifically ruled that NHEMA "has a federally enforceable right under 42 U.S.C. § 1983," the right "to be free of state law." 64 F. Supp. [2d] at 591. Therefore, the exception implied in the final paragraph of *Maryland Pest Control* - that if an action is maintainable under section 1983 as a suit to enforce statutory rights, then there can be an award of attorney's fees under section 1988 - is applicable. An examination of the most recent cases addressing the three-part test to determine whether a statute gives rise to a federal right enforceable under section 1983 supports the Court's previous determination. *See Blessing v. Freestone*, 520 U.S. 329 (1997); *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000).
>
> In addition, this decision of the Court was not challenged on appeal by the defendants or the intervenor-defendant. The Court has reviewed the briefs the parties filed in the Fourth Circuit, as well as the opinion of the Fourth Circuit. The appellants failed to appeal the Court's ruling that NHEMA has a federally enforceable right under section 1983. Accordingly, that ruling became the

> law of the case and is binding in these proceedings. *See Suel v. Secretary of Health and Human Services*, 192 F.3d 981, 985-86 n. 2 (Fed. Cir. 1999) ("It is particularly appropriate to invoke law of the case principles when a party has decided not to appeal an issue and further proceedings are conducted in reliance on that decision.")

Petition, App. 24-25. On appeal, petitioners again attempted to raise the issue that NHEMA was not a prevailing party under 42 U.S.C. § 1983, despite the district court's holding that the issue had been waived. The Court of Appeals said:

> When the parties filed cross-motions for summary judgment, they explicitly addressed whether the Parity Act conferred enforceable rights on NHEMA and its members. Virginia argued vigorously that no such rights were created, but NHEMA prevailed on that issue when the district court concluded, "the plaintiff has a federally enforceable right under 42 U.S.C. § 1983. . ."
>
> Virginia elected not to challenge the district court's conclusion that the Parity Act conferred a cause of action on NHEMA and its members. Rather, it limited its challenge to whether Virginia law was in conflict with the Parity Act. When we disposed of that issue in favor of NHEMA and its members, NHEMA became a prevailing party on its claims brought under the Parity Act and 42 U.S.C. § 1983.

> While Virginia suggests by implication that perhaps we should now review the question of whether the Parity Act conferred rights on NHEMA, "it is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand." *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (citations and internal quotation marks omitted.) Accepting as the law of the case the conclusions that NHEMA has a federally enforceable right under the Parity Act - a conclusion that we do not review - and that NHEMA sought to enforce that right, we find that this case does not fall within the rule announced in *Golden State Transit* and *Maryland Pest Control.*

Petition, App. 14-15. Thus, both the district court and the Court of Appeals recognized as the law of the case the district court's unappealed ruling from the district court's original judgment that NHEMA had a federal right enforceable under 42 U.S.C. § 1983. Under the law of the case, a court should not reopen issues decided at earlier stages of the same litigation. *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

The issue whether there is a federal right enforceable under § 1983 in this case is foreclosed under the law of the case doctrine by the final judgments of the district court and the United States Court of Appeals for the Fourth Circuit, and the denial of the first petition for writ of certiorari by this Court. In other words, the decision in *Gonzaga Univ. v. Doe* might have borne on an issue in the case on the merits, had that issue been preserved, but does not inform consideration of the issue of attorney's fees now before the

Court. That is what the Fourth Circuit clearly said in its published decision following remand.

> Although Virginia did, in the district court, contend that the Parity Act did not confer a right enforceable under 42 U.S.C. § 1983, the district court, applying the jurisprudence of the implied rights of action, *see Gonzaga*, 122 S.Ct. at 2275-77, rejected the argument and concluded that the Parity Act did create an enforceable right. We, however, never had an opportunity to review that ruling ....Thus, we were, and still are, left with the unappealed holding of the district court that the Parity Act created a right of action and that NHEMA prevailed on its assertion of that right of action. Thus, on the issue before us, the holding of *Gonzaga* is irrelevant.

Petition, App. 3-4. The Court of Appeals nevertheless recognized that the district court had applied the principles, if not the letter, of *Gonzaga* when it ruled in favor of NHEMA.

2. There Has Been No Change in the Controlling Law Because the Federal Right Invoked Was Explicitly Created in a Class of Intended Beneficiaries Including NHEMA's Members.

Under the facts of this case, there has been no change in the controlling law as a result of *Gonzaga Univ. v. Doe*. This is not a case in which there is an attempt to imply or infer a federal right. In its decision below in *National Home Equity Mortgage Ass'n v. Face* ("*Face I*"), 64 F.Supp.2d at 591, the district court tested NHEMA's claim under the three-part test in *Wilder v. Virginia Hosp. Ass'n*,

496 U.S. 498, 509 (1990). The court concluded that NHEMA met the *Wilder* test, holding that its members were intended beneficiaries of the right to make alternative mortgage transactions free of state regulation. *Id.*

When the ruling, unchallenged on appeal, was contested by appellants in the district court proceeding on attorney's fees, the district court revisited and reaffirmed its decision, noting that subsequent rulings in *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Doe v. Broderick*, 225 F.3d 440 (4th Cir. 2000), supported the court's previous determination. *National Home Equity Mortgage Ass'n v. Face*, No. 398 (E.D. Va., Apr. 5, 2001), at 3; Petition, App. 24-25.

Wilder and *Blessing v. Freestone* are cases discussed and cited, not overruled, in *Gonzaga Univ. v. Doe*. While the Court noted that certain language in *Blessing* had been misinterpreted, it cited *Blessing* twice for the proposition that § 1983 protects against violations of federal rights, not merely against violations of federal law. 536 U.S. at 282-83. Tested against the standard as clarified in *Gonzaga Univ. v. Doe*, the district court's decision in *Face I* is in full accord, as the Court of Appeals observed. *See* Petition, App. 3-4. The district court found that there was a specific federal right -- a present right to be free of state law -- created in intended beneficiaries -- nonfederally chartered housing creditors. *Face I*, 64 F.Supp.2d at 591; *see also* Petition, App. 24.

The operative language of the Parity Act states:

> It is the purpose of this title to eliminate the discriminatory impact that [federal] regulations have upon nonfederally chartered housing creditors and provide them with parity with federally chartered institutions by

> authorizing all housing creditors to make, purchase and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies.

12 U.S.C. § 3801(b)

> In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to the making, purchasing, and enforcing alternative mortgage transactions, housing creditors may make, purchase and enforce alternative mortgage transactions ...

12 U.S.C. § 3803(a)

> An alternative mortgage transaction may be made by a housing creditor in accordance with this section, *notwithstanding any State constitution, law, or regulation.*

12 U.S.C. § 3803(c) (emphasis added). The intent to create a specific federal right for housing creditors to make alternative mortgage transactions in accordance with federal regulations and without interference from state law could not be clearer.

The purpose of the Parity Act was to grant state-chartered mortgage lenders the right to make mortgage loans on the same terms as federally chartered lenders. *National Home Equity Mortgage Ass'n v. Face*, 239 F.3d at 635-36. As such, its sole purpose was to use the preemptive power of federal law to create a federal right for housing creditors. The right was explicit, not implicit. Even

petitioners disputed only the scope, not the fact, of federal preemption creating a federal right in housing creditors. *See id.* at 636.

In *Gonzaga Univ. v. Doe*, 536 U.S. at 276-77, the Court was considering the question of enforceability of the Federal Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, under 42 U.S.C. § 1983, an issue on which the federal courts had divided. The Court also sought to resolve ambiguities apparent in its jurisprudence setting standards for determining whether there is a federal right subject to enforcement under § 1983. *Id.*

The Court held that it was rare that federal spending legislation such as FERPA could give rise to enforceable federal rights. *Gonzaga*, 536 U.S. at 280-81. The Parity Act, however, unlike FERPA, is not spending legislation. It was enacted under Congress' power to regulate interstate commerce. *Face 1*, 64 F.Supp.2d at 512.

The *Gonzaga* court then analyzed what is required (1) to create a federal right, and (2) to show that such federal right is enforceable under § 1983. The Court held that these were distinct inquiries. 536 U.S. at 283. The first inquiry is whether Congress intended to confer individual rights upon a particular class of beneficiaries. *Id.* For a statute to create such rights, it must be "phrased in terms of the persons benefited." 536 U.S. at 284 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979). Once the plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983. *Gonzaga*, 536 U.S. at 284. The State may rebut this presumption by showing that Congress specifically foreclosed enforcement under § 1983. *Id.* at 284 n.4.

Applying these tests to the Parity Act shows beyond question that the Act creates a specific right in housing creditors to make alternative mortgage transaction free of state regulation if they conform to federally prescribed standards. The whole purpose of the Parity Act was to create a right for nonfederally chartered housing creditors to make alternative mortgage transactions under federal regulations. The intent of Congress to create the right of housing creditors to make such transactions is stated in explicit and unambiguous language. 12 U.S.C. § 3801(b). The right is phrased in terms of the persons benefited, and confers the right on an identifiable class. 12 U.S.C. §§ 3801(b), 3803(a), (c).

The Act by its terms permits enforcement of the transactions it authorized "notwithstanding any State constitutional, statutory, or regulatory provision". 12 U.S.C. § 3803(c). Far from foreclosing enforcement under § 1983, the Act specifically protects the right it creates against interference under color of state law.

The court below already considered and rejected the argument that the Act is not enforceable under § 1983. *Face I*, 64 F.Supp.2d at 591. The Parity Act is not spending legislation, nor does NHEMA's claim of a federal right depend on implication. The purpose of the Parity Act was to create a federal right immune from interference under state law. *Face I*, 64 F.Supp.2d at 591. The Act confers this specific individual federal right upon an identified class. *Id.* It satisfies all of the requirements in *Gonzaga Univ. v. Doe*, just as it satisfies all of the requirements for a federal right enforceable under § 1983 before *Gonzaga Univ. v. Doe*.

3. The Court Has Consistently Held that Congress Abrogated the States' Immunity Against Fee Awards Under § 1988, and Subsequent Decisions Have Not Altered That Conclusion.

Petitioners advance the same argument made in *Hutto*, that the States have sovereign immunity that bars liability for attorney's fees under § 1988, and absent a clear and unmistakable intent to abrogate that immunity by Congress acting pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, the Eleventh Amendment bars any such relief in federal court. *Hutto* rejected that argument. 437 U.S. at 693-95. Nevertheless, petitioners claim that the development of the "clear statement rule" after *Hutto* undermines its reasoning. The Court has already rejected the same argument in 1989 in *Missouri v. Jenkins*, 491 U.S. at 279-80, a case not distinguished, or even cited, by petitioners. Moreover, the Court's recent citation of *Hutto* with approval, *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994), shows that a majority of the present Court regard *Hutto* as settled law.

As relevant here, *Hutto* involved a challenge to an award of attorney's fees under § 1988. The Court held that when Congress enacted § 1988, it undoubtedly intended to exercise its plenary power to set aside the States' immunity from retroactive relief and to authorize fee awards payable by the States when their officials are sued in their official capacities. 437 U.S. at 694. The Court said:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically

> to restrain state action. *See, e.g.*, 42 U.S.C. § 1983.

Id. The Court went on to observe that the legislative history was equally plain. *Id.* Congress stated its specific intent that fee awards would be collected directly from the official in his official capacity, from the funds of his agency or funds under his control, or from the State or local government, regardless whether it was named as a party. *Id.* (citing S. Rep. No. 94-1011, at 5 (1976), *reprinted at* 1976 U.S.C.C.A.N. 5908, 5913). The Court also noted that Congress rejected at least two attempts to amend the Act and immunize state and local governments from fee awards. *Id.*

The Attorney General of Arkansas argued that these plain indications of legislative intent were not enough. *Id.* Instead, he argued, Congress must enact express statutory language making the States liable if it wishes to abrogate their immunity. The attorney general pointed out, like petitioners here, that the Court had refused to impose retroactive liability on States in the absence of an extraordinarily explicit statutory mandate. But the Court held that such cases concerned retroactive liability for prelitigation conduct, rather than expenses incurred in litigation seeking only prospective relief. 437 U.S. at 695. In that context, *Hutto* addressed directly the clear statement argument and rejected it.

Two years later, the Court considered the liability of the Supreme Court of Virginia and its Chief Justice for attorney's fees under § 1988. *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 730-39 (1980). The Court said: "We held in *Hutto v. Finney*, *supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers . . . based on

express legislative history indicating that Congress intended [§ 1988] to abrogate Eleventh Amendment immunity." *Id.* at 738. In *Kentucky v. Graham*, 473 U.S. 159, 170 (1985), a unanimous Court reaffirmed *Hutto*'s holding that when a State has been prevailed against for relief on the merits in a § 1983 action, fees are available from the State under § 1988.

Then, in *Missouri v. Jenkins*, the Court again confronted the argument that the language of § 1988 was inadequate under the clear statement rule. The *Missouri v. Jenkins* petitioners relied on the Court's further explication of the clear statement doctrine in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985), and *Dellmuth v. Muth*, 491 U.S. 223 (1989). While specifically noting that the petitioners relied on those cases, 491 U.S. at 279, the Court nevertheless reaffirmed its holding in *Hutto* that the Eleventh Amendment immunity of the States was abrogated by Congressional enactment of the 1976 amendment to § 1988. The Court said:

> The flaw in this argument lies in its misreading of the holding of *Hutto*. It is true that in *Hutto* we noted that Congress could, in the exercise of its enforcement power under § 5 of the Fourteenth Amendment, set aside the States' immunity from retroactive damages, and that Congress intended to do so in enacting § 1988. But we also made clear that the application of § 1988 to the States did not depend on congressional abrogation of the States' immunity. We did so in rejecting precisely the "clear statement" argument that Missouri now suggests has undermined *Hutto* . . . .

> The holding of *Hutto*, therefore, was not just that Congress had spoken sufficiently clearly to overcome Eleventh Amendment immunity in enacting § 1988, but rather that the Eleventh Amendment *did not apply* to an award of attorney's fees ancillary to an grant of prospective relief. That holding is unaffected by our subsequent jurisprudence concerning the degree of clarity with which Congress must speak in order to override Eleventh Amendment immunity, and we reaffirm it today.
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> * * *
>
> There is no need in this case to determine whether Congress has spoken sufficiently clearly to meet a "clear statement" requirement, and it is therefore irrelevant whether the Eleventh Amendment standard should be . . . as stringent as the one we applied . . . in [*Library of Congress v.*] *Shaw* [478 U.S. 310 (1986)].

491 U.S. at 279-81 (emphasis added) (internal citations omitted). The construction of § 1988 was instead a straightforward matter of statutory interpretation. *Id.* at 281-82.

Petitioners here fail to address *Missouri v. Jenkins*. What the Court's opinion in *Missouri v. Jenkins* decisively settles is that the Eleventh Amendment has no application to this case, because this is an award of attorney's fees ancillary to prospective relief against state officials. Furthermore, the settled law is that the test of the effectiveness of that abrogation is not the clear statement rule, a standard the Court has held is irrelevant in this

context. *Missouri v. Jenkins*, 491 U.S. at 281-82. Instead, it is merely a matter of statutory construction. "For this question, it is of no relevance whether the party against which fees are awarded is a State. The question is what Congress intended – not whether it manifested 'the clear affirmative intent ... to waive the sovereign's immunity.'" *Id.* at 282 (citation omitted).

4. The States' Historical Liability for Costs in Federal Court Provides Sufficient Basis for the Award of Fees Apart from Any Considerations of Immunity.

Quite apart from the Court's consistent holding that Congress has, to the extent necessary, in fact abrogated the States' Eleventh Amendment immunity against awards of attorney's fees under § 1988, such awards are fully justified under the Court's alternative rationale in *Hutto*. The Court held that § 1988 imposed attorney's fees as part of costs, and costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. 437 U.S. at 695. "The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants." *Id.*

In fact, the Court's subsequent jurisprudence has emphasized the cost prong of *Hutto*'s analysis. *See Missouri v. Jenkins*, 491 U.S. at 278-80. Petitioners challenge *Hutto*'s analysis factually and legally, asserting first that attorney's fees were not recoverable as costs in 1796 when the Eleventh Amendment was adopted, and next that Congress lacks the power to "evade" the Eleventh Amendment by "redefining" costs.

Petitioners are wrong as a matter of historical fact in asserting that attorney's fees were never awardable as costs. Petitioners cite the Court's discussion of the historical

treatment of attorney's fees in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249-50 (1975), to support the propositions that (1) attorney's fees were not recoverable against any party in federal court in 1796, Petition, at 12-13; and (2) Congress cannot "circumvent sovereign immunity by changing a definition of 'costs' that prevailed when the Constitution was ratified and that dates back through the centuries of the common law." Petition, at 19. Neither averment is accurate.

Alyeska cited *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306 (1796), for its holding that the judiciary would not create a general rule, independent of statute, allowing awards of attorney's fees in federal court. 421 U.S. at 249. *Arcambel* involved the award of attorney's fees as damages, not as costs. *Id.* at 249-50. The opinion in *Alyeska* goes on to show that petitioners' historical view is simply wrong. Costs, of course, are not a creature of the common law. *Id.* at 247. But statutory authorization for award of costs, including attorney's fees, has existed in England for centuries. *Id.* "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs." *Id.* at 247 n.18 (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967)).

Again, contrary to petitioners' recitation, in 1793 Congress enacted legislation providing that the same costs should be taxed in the federal courts, including for "attornies and counsellors' fees", as were allowed in the supreme or superior courts of the respective states. *Alyeska*, 421 U.S. at 248 n.19 (citing 1 Stat. 333, § 4). This provision was in effect until 1799, *id.*, and thus in effect when the Eleventh Amendment was adopted in 1798. Although the statute expired by its terms, the same practice,

referring to state rules governing awards of counsel fees, prevailed in the federal courts from 1799 until 1853. *Id.* at 250.

In 1853, Congress enacted an statute standardizing costs allowable in federal litigation. *Alyeska*, 421 U.S. at 251. Under the statute, the amount of counsel fees collectible from the opposing party was limited to the amount specified in the act. *Id.* at 252. It was asserted in support of the legislation that losing litigants were being unfairly saddled with exorbitant fees of the prevailing parties' attorneys. *Id.* at 251. It was also noted that all sixteen states in the Union at the time the system was adopted had laws that prescribed taxable costs for attorney's fees. *Id.* at 251 n.24.

The set attorney's fee taxable as costs has been carried forward in the federal statutes. *Id.* at 252-57. The provision setting the amount of the fee taxable to the losing party as a cost is now codified at 28 U.S.C. § 1923(a), and, as relevant here, is still twenty dollars as it was in 1853. 28 U.S.C. § 1923(a).

In Virginia, litigants have been liable for costs that included statutory attorney's fees since at least 1761. *See* 7 Hening's Statutes at Large 400-01. Substantially the same provisions remained in effect throughout the period of ratification of the Constitution and adoption of the Eleventh Amendment. *See* I Rev. Code of Va. (1819), ch. 76, §§ 14-17. Under Virginia law, as it was in effect before, during, and after the ratification of the Constitution and the adoption of the Eleventh Amendment, the taxable attorney's fees were the only fees counsel was permitted to receive. *See* I Rev. Code of Va. (1819), ch. 76, § 15. As shown above, these provisions were also in effect in the federal courts in Virginia after 1793. There has been no provision excusing the Commonwealth from such awards of costs.

Furthermore, just as in the federal system, there remains in effect a statutory provision in the state system for taxation of attorney's fees as costs that does not exempt the State. *See* Va. Code Ann. § 17.1-624.

The Court in *Alyeska* concluded that the determination of the circumstances in which awards of attorney's fees would be allowed was a matter for Congress to determine as a matter of statute. 421 U.S. at 262. In adopting § 1988, Congress did not alter the definition of costs. It simply increased them. The federal statutory definition of costs has included certain fixed attorney's fees since before the Civil War. *Hutto*, 437 U.S. at 697. The fact that Congress has increased the amount of fees recoverable does not implicate the Eleventh Amendment. *Id.* at 696.

Thus, the historical analysis of the allowance of attorney's fees as costs on which the Court relied in *Hutto* was, in fact, far stronger in its factual predicate than the Court set forth in its opinion. Before, during, and after adoption of the Eleventh Amendment, the state and federal courts in Virginia routinely awarded attorney's fees as part of costs. Moreover, the historical record also refutes petitioners' claim that Congress lacked the legal power to "change" the definition of costs. Statutory costs have always included attorney's fees. "It is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity." *Hutto*, 437 U.S. at 698.

The rationale of the cost prong of the Court's analysis is sufficient by itself to uphold the award of fees in this case and in § 1983 cases generally.

5. Because Petitioners Seek Wholesale Overruling of the Court's Prior Decisions, Considerations of Stare Decisis Weigh Heavily Against Granting the Writ On the Remaining Argument Based on the Rule in *Hensley v. Eckerhart.*

When a litigant comes before the Court asking to sweep away so broad a body of settled authority as petitioners seek here, the first hurdle is surely stare decisis. Considerations of stare decisis have special force in the area of statutory construction. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). In statutory construction, unlike constitutional interpretation, Congress's legislative power is implicated, and remains free to alter what the Court has done. Thus, the Court accords weight to Congress's continued acceptance of the Court's earlier holdings, because Congress could have corrected the Court's statutory construction if Congress disagreed with it, but has chosen not to so. *Id.* Because § 1988 has been amended since *Hensley*, Congress has clearly acquiesced in its holding. *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998).

The differing treatment of plaintiffs and defendants under § 1988 is grounded in clear and explicit legislative history. *Hensley*, 461 U.S. at 429. Just as is the case with *Hutto*, and as demonstrated even more recently, the majority of the Court regard *Hensley* as settled law. *Buckhannon Bd. & Care Home, Inc. v. West Va. Dept. of Health & Human Resources*, 532 U.S. 598, 603 n.4 (2001). In fact, the Court noted its specific reliance on the legislative history that the petitioners urge the Court to reject, stating that it had relied on the same legislative history in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989), *Maher v. Gagne*, 448 U.S. 122, 129 (1980), and *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980) (*per*

curiam), and would do so again. *Buckhannon*, 532 U.S. at 607.[1]

Under § 1988, when the State or its officials in their official capacities are defendants, they are treated no differently from any other defendants. When they are plaintiffs, they are treated no differently from other § 1983 plaintiffs. If one accepts for the sake of argument the undemonstrated premise of petitioners' argument, that State officials are more likely to be defendants in § 1983 cases, that is because § 1983 is a statute addressed to abuses under color of state law. This is an effect of the intent and subject matter of the particular statute, not a discriminatory application of § 1988. If anything, state officials are treated more favorably, because Congress recognized that fee awards may be paid by the State rather than the individuals. State officials often have been, as here and as in *Hutto*, represented by the state attorney general. Non-governmental § 1983 litigants generally lack such advantages.

In other cases subject to § 1988, such as actions under 42 U.S.C. §§ 1981, 1982, or 2000d, it might be rare for state officials to be defendants, but such private parties would not be heard to claim that the law was discriminatory. *See, e.g.*, *Morse v. Republican Party*, 517 U.S. 186 (1996), *on remand*, 972 F. Supp. 355, 359 (W.D. Va. 1997) (fees assessed against state political party and county party committee under § 1988).

The petitioners' argument is simply a plain language argument for a construction of the statute that ignores abundant evidence of Congressional intent. The Court has

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[1] Although the issue before the Court was different in *Buckhannon* and the cases cited, the Court could have added *Hutto* to the list of cases in which it had relied specifically on the legislative history of § 1988. *See Hutto*, 437 U.S. at 694.

indicated repeatedly, most recently last year, that it will continue to rely on the legislative history of § 1988 in construing the statute. Congress's intent is plain. To overturn the Court's longstanding construction of the statute now would merely invite a legislative response to restore what the Court has already recognized as clear Congressional intent.

CONCLUSION

The court below correctly applied the doctrine of law of the case to preclude further review of an issue waived on appeal on the merits. Furthermore, the lack of application of *Gonzaga* to the Parity Act is too clear to warrant a further remand.

As to their remaining arguments, the petitioners propose a radical overhaul of the nation's civil rights jurisprudence. Their arguments, however, proceed from dissent to dissent in advocating the adoption today of positions and arguments already rejected by the Court. As the Court held *in Missouri v. Jenkins*, *Hutto*'s reasoning survived *Atascadero State Hosp.* and *Dellmuth v. Muth.* There is no reason to conclude that the same reasoning is not proof against the same arguments, whether they are based on *Atascadero* and *Dellmuth v. Muth* or on *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999). After *Missouri v. Jenkins,* much as petitioners may want to impose it, the Eleventh Amendment simply has no applicability to a fee award under § 1988.

Petitioners have advanced no sound reason for the Court to retreat from its long-settled rulings and from what is not only a significant number of decisions of this Court, but a vast number of decisions in the federal courts below

made in reliance on *Hutto v. Finney* and *Hensley v. Eckerhart*.

Therefore, respondent National Home Equity Mortgage Association prays that the Court will deny the petition for writ of certiorari and allow settled federal law to remain settled.

Respectfully Submitted,

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